No. 89-1589

In The

Supreme Court of the United States

October Term, 1989

ALPHA WIRE CORPORATION, A NEW JERSEY CORPORATION AND PHILIP R. COWEN, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT AND CHIEF EXECUTIVE OFFICER OF ALPHA WIRE CORPORATION,

Petitioners,

v.

PEARL SIEGEL,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF THE CASE

On January 20, 1988, plaintiff, Pearl Siegel filed a Complaint alleging discharge on the basis of age in violation of the Age Discrimination Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), along with pendent state claims arising from her termination, against defendants Alpha Wire Corporation ("Alpha Wire") and Philip R. Cowen ("Cowen") individually and in is his capacity as President and Chief Executive Officer of Alpha Wire. Defendants moved on June 16, 1989 to dismiss or for summary judgment on all counts of the Complaint. On June 26, 1989, plaintiff filed a brief in opposition to the defendants motion to dismiss or for summary judgment. With respect to this motion, oral argument was heard on July 24, 1989 before United States District Court Judge Maryann Trump Barry ("Judge Barry"). On July 25, 1989, Judge Barry issued an opinion and order granting defendant's motion for summary judgment on plaintiff's, ADEA claim and dismissing the remaining pendent state claims.

On August 17, 1989, plaintiff filed a Notice of Appeal to the Third Circuit Court of Appeals. On January 8, 1990, the case was argued before the Third Circuit Court of Appeals before a panel consisting of Chief Judge Gibbons, Circuit Judge Scirica and District Judge Waldman. An opinion authored by Chief Judge Gibbons was issued on January 12, 1990. *Siegel v. Alpha Wire Corp.*, 894 F.2d 50 (3rd Cir. 1990). The Court of Appeals reversed the District Court's grant of summary judgment and remanded the case for further proceedings, with directions for the District Court to reinstate plaintiff's pendent state law claims and defendant's counterclaims. On April 10, 1990, defendants filed a petition for a

writ of *certiorari* to the United States Court of Appeals for the Third Circuit. Plaintiff opposes that writ.

The Court of Appeals as well as the District Court held that plaintiff Siegel had successfully made out a *prima facie* case of age discrimination under the ADEA. The District Court held, and the Court of Appeals affirmed, the finding that Siegel's age, the fact that she was replaced by one or two significantly younger individuals, her satisfactory performance ratings and Czerniawski's testimony that she was a "better than average" employee, all establish a *prima facie* case.

The Court of Appeals applied the standards enunciated in *Chipollini v. Spencer Gifts*, 814 F.2d 893 (3rd Cir.) (en banc), *cert. dismissed*, 483 U.S. 1052 (1987) in reviewing this grant of summary judgment. Once having decided that plaintiff had made out a *prima facie* case, the question that had to be resolved by the Court of Appeals was whether, in fact, Siegel had produced enough evidence to support an inference that the reasons articulated by Cowen for her discharge were pretextual. To this end, the Court of Appeals held:

> If a jury were to credit Siegel's evidence that Cowen more than once used the phrase "old dogs won't hunt", this, along with the fact that she had received good evaluations from Czerniawski and that Cowen articulated the reasons now alleged to be his motivation for firing Siegel only after she filed suit, could support a verdict in her favor. This is all that need be determined for Siegel to withstand the defendants' motion for summary judgment.

Siegel, supra at 55.

COUNTERSTATEMENT OF THE FACTS

Plaintiff adopts the factual statement as presented in the Third Circuit Opinion reported at 894 F.2d 50, 51-52 (3d Cir. 1990).

REASONS FOR DENYING THE WRIT

I.

THE THIRD CIRCUIT STANDARD FOR SUMMARY JUDGMENT IN AGE DISCRIMINATION CASES SHOULD NOT BE OVERRULED

In *Chipollini,* the Third Circuit in a well-reasoned opinion held that a plaintiff can withstand a Motion for Summary Judgment without direct evidence specifically relating to age by showing indirectly that the reason for the unfavorable treatment put forward by the employer is pretext. *Chipollini, supra* 814 F.2d at 898. In this regard, the Court's holding is consistent with prior case law. For example, in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089 (1981), the Supreme Court embraced the use, at the pretext stage, of indirect evidence attacking the credibility of defendant's proffered reasons for discharge. *Chipollini, supra* 814 F.2d at 899 (quoting *Burdine, supra* 450 U.S. at 256). In addition, *Chipollini, supra,* did not change the fundamental skeletal analysis concerning the method of proving age discrimination that relies on presumptions and shifting burdens of productions. Moreover, *Chipollini* is consistent with the basic tenets surrounding the use of summary judgment in accordance with the Federal Rules of Civil Procedure and supporting case law. A fair reading of *Chipollini* does not

suggest that summary judgment should be granted sparingly as defendants suggest. Similarly, a fair reading of *Matsushita Electric Industrial v. Zenith Radio*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) does not suggest that summary judgment should be granted liberally. Instead, all of these cases support the basic proposition that the burden to demonstrate the absence of material fact issues remain with the moving party regardless of which party would have the burden of persuasion at trial. These cases hold that summary judgment is appropriate only in the absence of disputed material fact issues.

The message of *Chipollini* is not, as defendants imply, that anyone who suffers an adverse employment decision can win a discrimination suit. Rather, this Court's message as articulated by Chief Justice Rehnquist is:

> When all legitimate reasons for rejecting an application have been eliminated as possible reasons for the employer's action, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on impermissible consideration.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). This framework places a premium on truthfulness by the defendant. If a "legitimate, non-discriminatory" reason articulated by a defendant faced with a *prima facie* case of discrimination is not the true reason . . . , the court may infer that the actual reason was impermissible. *Bruno v. W.B. Sanders*, 882 F.2d 760, 766 (3d Cir. 1989).

II

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE STANDARD FOR ASSIGNING BURDENS OF PROOF IN AN AGE DISCRIMINATION CASE

Upon reviewing the decisions from other circuits, it is clear based on their positive references to *Chipollini*, that *Chipollini* has broken new legal ground. The First[1], Second[2], Fourth[3], Seventh[4] and Eleventh[5] Circuits have all cited *Chipollini* with approval.

In fact, this Court recently dismissed *certiorari* as improvidently granted in a case challenging the validity of the *Chipollini* standards. *Harbison-Walker Refractories v. Brieck*, Case No. 87-271 12/12/88, 57 LW 4063. In *Harbison*, an ADEA case, the Third Circuit ruled:

> that "the record" in this Age Discrimination in Employment Act case contained evidence of implausibility and inconsistencies in employer's proffered reasons for discharge that could support inference that the employer did not act for non-discriminatory reasons, and therefore, under *Chipollini v. Spencer Gifts*, 814 F.2d 893, 55 LW 2557 (CA 3 1987), employer should not have been granted summary judgment. 57 LW 3028.

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[1] See *Manzel v. Western Auto Supply Co.*, 848 F.2d 327 (1st Cir. 1988).

[2] See *Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988).

[3] See *Harris v. Marsh*, 679 F. Supp. 1204 (E.D.N.C. 1981).

[4] See *Grafenhain v. Pabst Brewing Co.*, 827 F.2d 13 (7th Cir. 1987).

[5] See *Sparks v. Pilot Freight Carriers, Inc.*, 820 F.2d 1554 (11th Cir. 1987).

Thus, defendants' suggestion that this action would provide the Court with "an opportunity to address the problem it tried to address three years ago" (see petition for *certiorari*, at page 5) is erroneous. If this Court had any interest in addressing the Third Circuit's reading of *Chipollini* or the Court's other decisions in the area of summary judgment, it could have done so in the *Harbison-Walker* case. This Court specifically chose not to disturb this ruling by dismissing *certiorari* as improvidently granted.

Defendants raised the issue of overruling *Chipollini* at the Third Circuit. As Chief Judge Gibbons noted in his opinion in *Siegel* at footnote 2:

> The defendants argue that we should overrule *Chipollini*. Of course, we do not have the power to do so – a panel of this Court may not overrule a decision of another panel. In addition, *Chipollini* was decided by this Court sitting en banc, which makes doubly frivolous this invitation to overrule it. *Siegel, supra* at 53.

The Third Circuit opinion does not even suggest that it contemplates a need to reverse the *Chipollini* decision. Defendants make much of the Third Circuit calling this a "close case". However, a fair reading of the Third Circuit opinion shows that the phrase "[t]his case is a close one" refers to the factual background of the case not the validity of the *Chipollini* decision. *Siegel, supra* at 55.

CONCLUSION

The Third Circuit's interpretation of the burdens of proof under the Age Discrimination in Employment Act and the application of the *Chipollini* standards for summary judgment to the facts of this case was consistent with the ADEA and with applicable prior decisions in this area. The Third Circuit's decision does not create conflict with any other Circuit as to the standard for summary judgment in an ADEA case.

The Petition in short, should never have been brought before this Court. Plaintiff respectfully requests that this Court deny the petition and decline to issue a Writ of Certiorari in this case.

Respectfully submitted,

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